In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES
v.
JOSEPH S. HARRIS, EDWARD M. PAXSON, and JOHN LOWBER WELSH, receivers of the Philadelphia and Reading Railroad Company. } No. 169.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The original suit was brought by the United States against Joseph S. Harris, Edward M. Paxson, and John Lowber Welsh, receivers of the Philadelphia and Reading Railroad Company, under sections 4386, 4387, 4388, and 4389 of the Revised Statutes, to recover a penalty for confining horses, in the course of interstate transportation, in cars more than twenty-eight consecutive hours without unloading them for rest, water, and food.

The case was tried before a jury, and a verdict rendered in favor of the Government, but Judge Butler

entered judgment for the receivers *non obstante veredicto*, holding, as matter of law, that the statute does not apply to a railroad company in the hands of receivers. The bill of exceptions shows (record, pp. 8, 9):

> Upon the trial the counsel of the said United States called a number of witnesses, the substance of whose testimony was that the defendants, as receivers aforesaid, while being in possession of and operating the property of a railroad company, whose road formed a part of a line of road over which cattle, sheep, swine, and other animals were conveyed from the State of New York to the State of Pennsylvania, did, through their agents, within the district aforesaid, on November 24, 25, and 26, 1895, knowingly and willfully confine certain horses in a car for a longer period than twenty-eight consecutive hours, without unloading the same for rest, food and water for at least five consecutive hours, contrary to the provisions of sections 4386, 4387, and 4388 of the Revised Statutes of the United States.
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> The counsel for the defendants produced evidence in defense of the plaintiff's claim, and the learned judge thereupon charged the jury, reserving for subsequent determination the following points of law submitted by counsel for defendants:
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> 1. The statute under which this suit is brought is a penal one, and must be strictly construed. It does not include within its terms receivers of railroads, and the defendants can not be held liable as such receivers in this action.
>
> 7. Under all the evidence in this case your verdict should be for the defendants.
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> And thereupon the jury did find a verdict for the plaintiff in the sum of two hundred ($200) dollars, with six (6) cents costs.

The opinion of Judge Butler rendering judgment *non obstante veredicto* appears in the record, pages 6 and 7.

The opinion of the circuit court of appeals (Acheson and Dallas, circuit judges, and Kirkpatrick, district judge), is printed in the record, page 14. It simply adopts the views of Judge Butler.

ARGUMENT.

I.

This action was brought, without leave of the court, against the receivers of the Philadelphia and Reading Railroad Company, by virtue of the provisions of the second and third sections of the act of August 13, 1888 (25 Stats., 436), which reads as follows:

> SEC. 2. That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, *such receiver or manager shall manage and operate such property* according to the requirements of the valid laws of the State in which such property shall be situated, *in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.* Any receiver or manager who shall willfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> SEC. 3. That every receiver or manager of any property appointed by any court of the United States *may be sued in respect of any act or transaction of his in carrying on the business connected with*

> *such property*, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

Applying the second section to a railroad, it requires, under a severe penalty, that a receiver, appointed by a United States court, in possession of a railroad, shall manage and operate the same according to the laws of the State in which it is situated, in the same manner that the railroad company would be bound to do if in possession. The Government takes the ground that railroad receivers appointed by its courts must operate railroads in accordance with the State laws regulating railroads. Laws regulating railroads must be obeyed irrespective of the managing body.

A railroad is a railroad whether operated by officers or by receivers; a change of management does not change the character of the property nor exempt it from the laws which a wise public policy has applied to such common carriers. Of course, this section does not in terms refer to and include the laws of the United States, but the spirit and policy of it should be kept in mind in construing the laws of the United States. Since Congress requires railroad receivers appointed by United States courts to obey the State laws, is it reasonable to conclude that it expected them to ignore its own laws?

In further recognition of the principle that a railroad is a railroad whether operated by a company through its officers or by a company through its receivers, the second

section grants permission to sue a receiver, "in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court."

The scope and purpose of this act is well described by Judge Thayer, speaking for the circuit court of appeals, in *Eddy* v. *Lafayette* (49 F. R., 807, 809):

> The third section of the judiciary act of March 3, 1887 (24 Stats., 554), authorizing suits to be brought against receivers of railroads without special leave of the court by which they are appointed, was intended, as we think, *to place receivers upon the same plane with railway companies, both as respects their liability to be sued for acts done while operating a railroad* and as respects the mode of obtaining service.

The statute came before this court for construction in *McNulta* v. *Lochridge* (141 U. S., 327), and the court held, speaking by Mr. Justice Brown, that under it an action will lie against a receiver for causes of action accruing under his predecessor in office (p. 332):

> So long as the property of the corporation remains in the custody of the court and is administered through the agency of a receiver, such receivership is continuous and uninterrupted until the court relinquishes its hold upon the property, though its *personnel* may be subject to repeated changes. *Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands.*

II.

A receiver appointed by a court to take charge of a railroad exercises the rights and privileges and is subject to the duties and obligations of a common carrier. The fact that he is appointed by a court does not place him above the laws regulating railroads. Indeed, having been appointed by a tribunal charged with the enforcement of law, a railroad receiver ought especially to observe the laws regulating the operation of the railroad of which he has been placed in charge by the court. As was said by Chancellor Van Kleet in *Klein* v. *Jewett, Receiver, et al.* (26 N. J. Eq., 474):

> Upon principle it would seem to be clear that no person can be permitted to exercise the rights and powers of a common carrier, especially where they embrace the franchises granted to a railroad corporation, except subject to the duties and liabilities of common carriers. Whether the receiver is regarded as the officer of the law, or the representative of the proprietors of the corporation, or its creditors, or as combining all these characters, he is intrusted with the powers of the corporation, and must therefore be necessarily burdened with its duties and subject to its liabilities. There can be no such thing as an irresponsible power, exerting force and authority, without being subject to duty, under any system of laws framed to do justice.

The general rule regulating actions against receivers of railroads under the common low and under the statutes is stated in High on Receivers (3d ed., p. 388):

> And since they (the receivers of a railroad) exercise the functions and powers of common carriers,

> they can not escape corresponding duties and liabilities. When, therefore, a statute of a State provides that railway companies shall be liable for all damages which may be sustained by any employee by reason of the negligence of other employees, or when damages are given by statute for the killing of cattle by a railway company, a receiver operating a railway is liable in like manner and to the same extent as the company itself would have been.

Under the common law a master is not liable to a servant for an injury sustained in consequence of the negligence of a fellow-servant. Kansas passed a statute abrogating this rule and making "every railroad company doing business in that State" liable for damages to an employee in consequence of the negligence of any of its servants. In the case of *Hornsby* v. *Eddy* (56 F. R., 461) it was held that this statute applied to a railroad company in the hands of its receiver as well as to one while managed by its officers. Judge Thayer, speaking for the circuit court of appeals of the eighth circuit, said, page 462:

> It is a fact of which we may well take judicial notice that great railway systems, which employ thousands of men, are frequently operated for a term of years through the agency of a receiver. Such receivers do not, as a general rule, change the working force of the road, or the rules and regulations by which trains are run or by which the other business of the road is transacted. The men whom they employ are engaged in the same quasi public service as other railway employees, and daily encounter the same risks and hazards. Furthermore, the receiver of a railroad operates it for the immediate benefit of the company by which it is owned, in that

> he discharges all of the public duties of the corporation, and appropriates the income of its road to the preservation of its property and franchises and to the payment of its debts. In view of the fact that many railroads have been operated for years by receivers, and the manner in which it is customary to operate them, Congress has recently recognized both the justice and the expediency of placing such receivers on a plane with railway corporations, by declaring in explicit language:
>
> (Quoting section 2 of the act of August 13, 1888; 25 Stats., 436; *supra*).

For these reasons, and because the evident intention of the lawmaker was to abrogate the old common-law rule in the case of railroads, however operated, the court adopted the above construction in accordance with the obvious spirit and purpose of the act.

So the Federal courts have held that their receivers must observe statutes forbidding unjust discriminations, although they contain no express mention of receivers and in terms apply only to railway companies. (*Missouri Pacific Ry. Co.* v. *Texas and Pacific Ry. Co.*, 30 F. R., 2; *Cutting* v. *Receiver*, 43 F. R., 747.)

In the case of the *Central Trust Co.* v. *Wabash, etc., Ry. Co.* (26 F. R., 12), the railroad fencing law of Missouri, providing for double damages resulting from a failure to fence, was applied to the Wabash Railroad while operated by its receivers, although the law in terms only applied to railroad corporations. The following is the opinion of Mr. Justice Brewer, then circuit judge, p. 12:

> In this case the only question is whether the double damage act of the State of Missouri is to be

enforced as against railroad property in the hands of a receiver. The Supreme Court of the United States have affirmed the validity of that act; and I know of no reason why it is not applicable to every road in the State, whether in or out of the hands of a receiver. It is true there may be no equity, where the court takes possession of the assets of an insolvent corporation, in saying to one man, whose cow is killed, "We will double the value of your cow as a basis of adjustment," and to a man who has done a day's work, "We will adjust your claims only at the value of such work," and then distribute the assets upon that basis between them. But while there may be no equity in that mode of distribution (and so I said in response to a letter written by some one who wanted to have me send all these cow cases to the State courts for trial), yet when the question is put directly before the court as to whether it will or not recognize the binding force of the statute against a road in the hands of its receivers, I have no doubt but that it is its duty to recognize it as binding and adjust the compensation accordingly.

III.

The statute in question was passed by virtue of the power granted to Congress by the Constitution "to regulate commerce with foreign nations and among the several States (Art. 1, sec. 8). I shall refer hereafter to several acts relating to railroads, in passing which Congress has exercised the power thus granted. The act under which this suit was brought was passed March 3, 1873, and was entitled "An act to prevent cruelty to animals while in transit by railroad or other means of transportation within the United states." It was carried

into the Revised Statutes and became sections 4386, 4387, 4388, and 4389, reading as follows:

SEC. 4386. *No railroad company* within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one State to another, *or the owners or masters of* steam, sailing, or other *vessels carrying or transporting* cattle, sheep, swine, or other *animals from one State to another, shall confine the same* in cars, boats, or vessels of any description, for *a longer period than twenty-eight consecutive hours, without unloading the same for rest, water, and feeding,* for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included, it being the intent of this section to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon contingencies hereinbefore stated.

SEC. 4387. Animals so unloaded shall be properly fed and watered during such rest *by the owner or person having the custody thereof, or in case of his default* in so doing, then *by the railroad company or owners or masters of boats or vessels transporting the same* at the expense of the owner or person in custody thereof; and such company, owners, or masters shall in such case have a lien upon such animals for food, care, and custody furnished, and shall not be liable for any detention of such animals.

SEC. 4388. *Any company, owner, or custodian of such animals who knowingly and willingly fails to comply with the provisions of the two preceding sections,* shall, for every such failure, be liable for and forfeit and pay a penalty of not less than one hundred nor

more than five hundred dollars. But when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply.

SEC. 4389. The penalty created by the preceding sections shall be recovered by civil action in the name of the United States, in the circuit or district court of the United States, holden within the district where the violation may have been committed, or the person or corporation resides or carries on its business; and it shall be the duty of all United States marshals, their deputies and subordinates, to prosecute all violations which come to their notice or knowledge.

This is an act regulating a class of traffic within the power of Congress, namely, the transportation of cattle, sheep, swine, or other animals from one State to another, whether by rail or boat. It provides that such animals shall not be confined, either in cars or boats, longer than twenty-eight consecutive hours, without unloading them for rest, water, and food for at least five consecutive hours. Animals unloaded must be properly fed and watered by their owner or custodian, or in case of his default, by the railroad company or the owner or master of the boat, in which event the latter shall have a lien on the animals for the food, care, and custody furnished.

Such are the broad provisions of sections 4386 and 4387. Section 4388 contains the sanction of the law and provides that "*any company, owner, or custodian of such animals*" who knowingly fails to comply with these provisions shall, for every such failure, be liable for and forfeit and pay a penalty of not less than $100 nor more

than $500, while section 4389 provides that this penalty shall be recovered by civil action in the name of the United States.

Let me request the court's careful scrutiny of the words "*any company, owner, or custodian of such animals,*" used in section 4388, when read in the light of the provisions of sections 4386 and 4387. Section 4386 provides that "no railroad company," or "the owners or masters" of any vessel, shall confine the animals in transit longer than the period named without unloading them for rest, water, and food. Section 4387 imposes, primarily, upon "the owner or person having the custody" of the animals the duty of feeding and watering them when unloaded. Thus, section 4386 imposes a duty upon railroad companies and the owners or masters of vessels, while section 4387 imposes a duty upon the owners or custodians of the animals. It is for violating these duties that section 4388 provides the penalty, yet section 4388 in terms applies only to "any company, owner, or custodian of such animals." *It is clear, therefore, that the words "any company" used in section 4388 were intended by Congress and must be held to cover and include the common carrier, whether by rail or water, upon whom the duty was imposed by section 4386 of unloading the animals.*

In framing this act, Congress had in mind throughout the class of traffic to be regulated, and not the operating agency. General terms were used in describing the operating agency both in the sections providing the regulations and in that prescribing the penalty for their violation. The term "company" is an exceedingly broad one. In the popular mind it indicates the person

or persons, the association or corporation, carrying on the business of a common carrier by rail or water. The operator of a railroad line is a railroad company. The operator of a steamboat or steamship line is a steamboat or steamship company. The public does not stop to inquire what constitutes the company or how it acts, whether through officers or receivers; it is sufficient for the public if it runs a railroad, or steamboat, or steamship. It was in such sense that Congress used the word "company" in this act. It indicates the common carrier who enjoys the privileges and is subject to the obligations of carrying on the railroad or steamboat business.

The act in question was a humane one. Its title shows it was designed to prevent cruelty to animals while in course of interstate transit. It was not only intended to do this, but to protect the communities to which these animals might be shipped for use. Stock shipped for slaughter and confined an unreasonable time without rest or feed or water is apt to produce unwholesome meat, and this Congress knew. The act concerned itself only with the class of traffic. It did not concern itself with the operating agency. The regulations were to be complied with whenever animals were transported by rail or boat from one State to another. It did not matter who ran the railroad or the boat. Whoever ran the railroad or the boat had to see that these wholesome and humane regulations were complied with or had to pay the penalty for violating them. Let me now refer to a few cases construing or commenting upon this act and indicating its scope and purpose.

CASES.

In the case of *East Tennessee, Virginia and Georgia Railroad Co.*, 13 F. R., 642 (1882), Key, D. J., very properly held that section 4386 of the Revised Statutes only applies to shipments from one State to another, and does not cover the conveyance of animals from one point to another within the same State.

In *United States* v. *Boston and Albany R. R. Co.*, 15 F. R., 209 (1883), Nelson, J., sustained the constitutionality of the act and held that only one penalty can be applied for a shipment, not a separate penalty for each and every animal included. After referring to the cases sustaining the authority of Congress under the interstate-commerce clause, he says, page 211:

> The statute in question is directly within the terms of this clause of the Constitution. *It imposes regulations upon a particular class of traffic between States, and declares in what manner and upon what conditions it shall be carried on.* The statute can not be any the less within the constitutional authority of Congress, because its object is to require the humane treatment of live animals when in course of transportation, as articles of commerce, from one State to another.

The regulation is of a particular class of traffic, namely, the transportation of live animals. It is not a regulation of a particular class of carriers, that is, of corporations carrying on the railroad business, as distinguished from receivers of corporations. The statute reaches the class of traffic irrespective of the management which carries it on.

In *United States* v. *Louisville and Nashville Railroad*, 18 F. R., 480 (1883), Key, J., in charging a jury, held that where more than one railroad had handled the shipment, only the railroad in possession of the animals after the twenty-eight hours had expired was liable for the penalty. In other words, a railroad is not responsible for what happens after its control of the animals has ceased. As to the purpose of the law, Judge Key says, page 482:

> Cattle and other quadrupeds used for food appear to be the primary objects of protection by Congress from long confinement without food or water. We know, too, as a part of the history of the times which induced this legislation, that immense numbers of cattle were shipped over the long lines of railroads in the West to the Eastern cities, deprived of food and water for days, and stopped at the stockyards before being carried into the great cattle markets, like New York, and there gorged with food and water. *Consequently these statutes were passed, not more from considerations of sympathy for the cattle than to protect the public from imposition and from unwholesome food.*

If Congress passed this law to protect the public as well as to prevent cruelty to animals, how is it possible fairly and reasonably to conclude that the statute was intended to apply to a railroad in the hands of its directors and not to a railroad in the hands of its receivers. Congress had in mind the transportation of animals from one State to another, whether by boat or by rail, and it intended to hold the one in control of such transportation liable, if the humane regulation promulgated for the protection of the animals and the benefit of the public should be violated.

In *Newport News and Mississippi Company* v. *The United States* (61 F. R., 488), the circuit court of appeals, Judge Lurton delivering the opinion, held that unavoidable causes only would excuse a failure to comply with the provision requiring the unloading of cattle for rest, water, and feeding. The railroad company insisted that an accident to the train, although due to the negligence of its servants, would excuse a compliance with the law, but the court said, page 490:

> This reasoning, while plausible, is not satisfactory. To yield to it would emasculate a statute having a most humane object in view.

May we not say that the construction put upon this act by the lower courts emasculates it? There have been times when two-thirds of the railroads carrying on interstate business were in the hands of a receiver. And yet, taking the view of the courts below, such railroads are exempt from complying with the humane provisions of this act!

In *Cutting* v. *Kansas City Stock Yards Company* (82 F. R., 839) (1897), Foster, J., describes the purpose of this act as follows, page 843:

> The law of Congress concerning the unloading of cattle during their shipment (sections 4386–4388 Revised Statutes) is a humane provision, fixing a maximum period of twenty-eight hours for confining live stock without rest, food, or water. No one would question the necessity of unloading, feeding, watering, and resting this live stock; and the duty, from a moral, if not from a financial standpoint, to do this act of humanity for these poor creatures was just as imperative before as after the passage of the law.

Now, is there any less necessity for unloading, feeding, watering, and resting live stock when the railroad is operated by receivers than when it is operated by directors? If not, how can it be insisted that Congress did not intend to apply the law to the railroad and its operator, whatever the latter might be?

IV.

The statute under consideration is not the only one in which Congress has exercised its power to regulate commerce among the several States by enacting laws applying to interstate railways. The act under consideration is only one of six acts upon this general subject. Let me refer to the other acts for the purpose of showing that they each apply to an interstate railroad, irrespective of its management, and whether it is in the hands of its officers or its receivers.

1. The act of June 15, 1866, carried into the Revised Statutes as section 5258, provides:

> Every railroad company in the United States whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, Government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination. * * *

Here is a grant by Congress, under its power to regulate commerce among the several States, to every railroad

company carrying on interstate business, to transport passengers and freight from one State to another and to receive compensation therefor. The grant is to a "railroad company." Will it be insisted that as soon as a railroad goes into the hands of a receiver it loses the rights and privileges granted to it by this act? On the other hand, if it does not, does it become exempt from the duties and obligations which the Government has imposed upon it as a carrier of live stock from one State to another? The rights and privileges granted by this section appertain to the railroad, no matter by whom operated. So, too, do the duties and obligations imposed by section 4386.

2. Sections 6 and 7 of the act of May 29, 1884 (23 Stats., 31), establishing a Bureau of Animal Industry, prohibit railroad companies and boats from transporting live stock affected with any contagious or infectious disease, from one State to another. These sections read as follows:

> SEC. 6. That *no railroad company* within the United States, or *the owners or masters* of any steam or sailing or other vessel or boat, shall receive for transportation or transport, from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia; nor shall any person, company, or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious, or

communicable disease; nor shall *any person, company, or corporation drive on foot or transport in private conveyance* from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia: *Provided*, That the so-called splenetic or Texas fever shall not be considered a contagious, infectious, or communicable disease within the meaning of sections four, five, six, and seven of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto.

SEC. 7. That it shall be the duty of the Commissioner of Agriculture to notify, in writing, the proper officials or agents of any railroad, steamboat, or other transportation company doing business in or through any infected locality, and by publication in such newspapers as he may select, of the existence of said contagion; *and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of or person having control over such cattle* or other live stock, within such infected district, who shall knowingly violate the provisions of section six of this act shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.

It is to be observed that the sixth section applies in terms only to railroad companies. It does not mention receivers. Will it be contended that it applies only to

railroad companies acting through directors and not to those acting through receivers? Is a railroad company operating through receivers free to carry diseased cattle into any State, notwithstanding the prohibition of this act? The seventh section provides a punishment by fine or imprisonment for the violation of section 6 by "any person or persons operating such railroad, or the master or owner of any boat or vessel." The words "any person or persons operating any such railroad" are used as the equivalent of "a railroad company," within the meaning of the act.

3. The interstate-commerce act of February 4, 1887, as amended in 1889 and 1891. This act creates a commission with power to investigate, regulate, and control, in defined ways, interstate commerce by railroads. The provisions of this act apply "to any common carrier" transporting passengers or property by railroad from one State to another. Whether the railroad is operated by the company or a receiver is immaterial.

4. The act of October, 1888 (25 Stats., 501). This act provides that whenever controversies arise "between railroad and other transportation companies" engaged in interstate commerce and their employees and a proposition for arbitration by either party is made and accepted by the others, "in such event the railroad company" is authorized to appoint one person and the employees another, and the two thus selected a third who are constituted by the act a board of arbitration with certain duties, powers, and privileges. This act in terms applies only to a railroad company, but I fancy no one will contend that a railroad in the hands of a receiver can not

employ the machinery of this act to arbitrate differences with its employees.

5. The act of March 2, 1893 (27 Stats., 531), requiring the use of automatic couplers on interstate trains, and empowering the Interstate Commerce Commission to enforce its provisions. This act applies to "any common carrier engaged in interstate commerce by railroad." It of course applies to every interstate railroad company, whether operated by its directors or by a receiver. The fact that Congress has used the term "any common carrier by railroad" as an equivalent of "any railroad company" is shown by the provisions of the fourth section of this act, which makes it unlawful for "any railroad company" to use any car in interstate commerce not provided with secure grab irons or hand holds.

The first section makes it unlawful for any common carrier to use a locomotive in moving interstate traffic not equipped with a power or train brake. The second section makes it unlawful for any common carrier, after a certain date, to use cars in moving interstate traffic not equipped with automatic couplers. The third section empowers any person or company engaged in interstate commerce by railroad to refuse to receive cars not equipped with power or train brakes, and the fourth section provides as above. The court will observe the varying phraseology of these sections, namely, "common carrier engaged in interstate commerce," "such common carriers," "any person, firm, or company engaged in interstate commerce by railroad," "any railroad company * * * in interstate commerce." The language is different, but the meaning is the same. And

this is apparent by an examination of the sixth section, which provides a penalty for violating any of the provisions of the act, and applies to "any common carrier," thus reaching the operator, whether a person, company, or receiver.

IV.

But it is insisted that, notwithstanding the purpose and policy of the law, this suit was a penal proceeding to inflict punishment by enforcing a penalty, and therefore the strict rules of the criminal law must be applied in construing section 4388, under which the suit was brought. Since the statute only names as subject to the penalty for a violation of the law "any company, owner, or custodian of such animals," and since the receivers are neither a company nor an owner nor a custodian, the lower courts held that the suit could not be maintained; in other words, that the law does not apply to a railroad when operated by its receivers. Said Judge Butler (Record, pp. 6, 7):

> The construction of the statute, and the proceeding under it are governed by the rules of the criminal law as fully as if the proceeding was by indictment. The exclusive purpose of the section is to inflict punishment. Those named as liable to such punishment are *the railroad company, the owners, and the custodians of the animals.* The defendants here sued are neither. What reason, therefore, is there of supposing that the suit can be maintained? The language must receive a strict construction, confined to its obvious import. (*United States* v. *Hartwell*, 6 Wallace, 395; *United States* v. *Wiltberger*, 5 Wheat., 76; *Groosm* v. *Harmon*, 59 Ala., 519; *Com.* v. *Wells*, 110 Pa. St., 463.)

I shall take up later the statement of Judge Butler that "those named as liable to such punishment are the railroad company, the owners, and the custodians of the animals." It is clearly incorrect. At present I desire to discuss the rule of construction laid down by the judge. In a sense, but only in a sense, the section is a penal one. It provides for a penalty. But the act itself is not a penal act. It applies to interstate commerce a wholesome regulation for the prevention of cruelty to animals and for the protection of the public health. Such an act ought to be construed so as to carry out the manifest intention of Congress in enacting it. (*Taylor* v. *United States*, 3 How., 109.) I deny that there exists any rule of strict construction which requires the court to cripple and nullify this law, because of the use of a general term, when the meaning of the act and the intent of Congress is clear and unmistakable. Laws in this country are not drawn by precisians in the use of language. Ordinary language is used, and as such must be construed, keeping in mind the object of the law.

The rule of strict construction invoked by the lower court is no longer applied as it was in the days when the cruelty of the English criminal law led to its adoption as a merciful measure by the courts.

Says Maxwell on the Interpretation of Statutes (2d ed.), page 18:

> The rule which requires that penal and some other statutes shall be construed strictly was more rigorously applied in former times, when the number of capital offenses was one hundred and sixty or more; when it was still punishable with death to

> cut down a cherry tree in an orchard, or to be seen for a month in the company of gypsies. But it has lost much of its force and importance in recent times, since it has become more and more generally recognized that *the paramount duty of the judicial interpreter is to put upon the language of the legislature, honestly and faithfully, its plain and rational meaning, and to promote its object.* It was founded, however, on the tenderness of the law for the rights of individuals, and on the sound principle that it is for the legislature, not the court, to define a crime and ordain its punishment.

Similar is the statement of the existing rule by Sedgwick on Statutory and Constitutional Law (2d ed., p. 282):

> The rule that statutes of this class are to be construed strictly is far from being a rigid or unbending one; or, rather, it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment, the courts refusing, on the one hand, to extend the punishment to cases which are not clearly embraced in them, and, on the other, equally refusing by any mere verbal nicety, forced construction, or equitable interpretation to exonerate parties plainly within their scope.

These authorities are quoted with approval by the court, speaking by Mr. Chief Justice Fuller, in *United States* v. *Lacher* (134 U. S., 624, 629). In this case the rule of strict construction was unsuccessfully invoked in a prosecution of an employee in the New York post-office charged with embezzling a letter. The Chief Justice, before citing Sedgwick and Maxwell, says (p. 628):

> As contended on behalf of the defendant, there can be no constructive offenses, and before a man can be punished his case must be plainly and unmistakably within the statute. But though penal laws are to be construed strictly, yet *the intention of the legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature.* (*United States* v. *Wiltberger*, 5 Wheat., 76; *United States* v. *Morris*, 14 Pet., 464; *Am. Fur Co.* v. *United States*, 2 Pet., 358, 367.)
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> "It appears to me," said Mr. Justice Story, in *United States* v. *Winn* (3 Sumner, 209, 211), "that the proper course in all these cases is to search out and follow the true intent of the legislature, and *to adopt that sense of the words* which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature.

In the case of the *United States* v. *Hartwell* (6 Wall., 395) the modification of the old rule of strict construction, which obtains now, is stated with great clearness and fullness. That was a case where a clerk in the office of the assistant treasurer at Boston was indicted and convicted of embezzlement as an "officer." The court held that although the word "clerk" was not mentioned in the act, and although the defendant was known only as a "clerk," he was an officer within the intent and meaning of the law. The court, speaking by Mr. Justice Swayne, said (p. 395):

> We are not unmindful that penal laws are to be construed strictly. It is said that this rule is almost as old as construction itself. But whenever invoked it comes attended with qualifications and other rules no less important. It is by the light

> which each contributes that the judgment of the court is to be made up. *The object in construing penal, as well as other statutes, is to ascertain the legislative intent. That constitutes the law.* If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and over-strict construction. The rule does not exclude *the application of common sense* to the terms made use of in the act in order to avoid an absurdity, which the legislature ought not to be presumed to have intended. *When the words are general and include various classes of persons there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all.* The proper course in all cases is to adopt that sense of the words which best harmonizes with the context and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or *the more extended of two meanings, as the wider popular instead of the more narrow technical one;* but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent.

So much as to the rule of construction now applied to so-called penal statutes. The words must not be narrowed to the exclusion of what the legislature intended to embrace. The rule does not exclude the application of common sense to the terms made use of in the act

in order to avoid an absurdity, which the legislature ought not to be presumed to have intended. The rule of strict construction is not violated by permitting the words to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context and promotes in the fullest manner the policy and objects of the legislature.

I have already discussed the scope and object of the act. The act regulates a particular class of traffic, the transportation of animals from one State to another, whether by rail or boat. It requires that such animals shall not be confined longer than twenty-eight consecutive hours without unloading them for rest, water, and food. The act looks to the means of transportation, the railroad and the boat. The person or company owning or operating the one or the other must do what the law requires in this class of traffic. The words "railroad company" denote the owner or operator in the case of a railroad, just as the words "owners or masters" embrace the owner or operator in the case of boats or vessels. This is the popular meaning of the language used. The public speaks of the Philadelphia and Reading Railroad Company as the operator of that line, whether the company is run by its officers or by its receivers. The company advertises its business in that way, whether run by its officers or by its receivers. It is still the Philadelphia and Reading Railroad Company. This is true of the Baltimore and Ohio Railroad Company, or any of the other numerous companies. No

distinction is drawn in the popular mind between a railroad company operated by its officers and the same company operated by its receivers. To the public it is one and the same company, furnishing the same facilities, entitled to the same rights, and subject to the same duties. One who uses the railroad either as passenger or shipper, expects the same protection whether the company is acting through its officers or its receivers. Congress used this language just as the people understand it, as describing the common carrier engaged in running a railroad. It is absurd to take any other view. There have been times when two-thirds of the railroads of the country were in the hands of receivers. What possible ground of distinction can be suggested between a railroad company acting through its officers and one acting through its receivers? Why should this regulation be applied to one and not to the other, and if the regulation was intended to be applied to the railroad company in both cases, and this is the only sensible construction, why should not the penalty apply to both? The penalty must apply to both or the law as to one is a dead letter. No wrong to railroad receivers can result from making them liable for a violation of this law. They are liable, not as individuals, but as officials. They stand in the place of the company. They must observe the laws as the representatives of the company, and if they or their agents do not they are liable to the penalty, not as persons, but as the representatives of the company, the sum adjudged against them being payable out of the earnings of the company in their hands.

I have already pointed out that the words "any company, owner, or custodian of such animals," used in section 4388, are intended to cover all those who can possibly violate the preceding two sections. The words "every company," therefore, must be held to apply to the common carrier, whether by rail or by boat. They include, therefore, a railroad company, whether a person, a partnership, or a corporation, and whether acting individually or through officers or receivers, and also a steamboat or steamship company, whether a person, a partnership, or a corporation, and whether acting individually or through officers or receivers.

With respect to quasi-public agencies, such as railroads, street railroads, telegraphs, telephones, etc., the word "company" is used to denote the person or persons, partnership, association, or corporation which carries on the business. The States, in their statutes, have defined the term "company" so as to cover the case and reach the operator. Thus the Ohio law (92 Ohio Laws, p. 79) provides that "any person or persons, joint stock association, or corporation, wherever organized or incorporated, * * * when engaged in the business of operating a railroad, either wholly or partially within this State, whether on rights of way acquired and held exclusively by such company, or otherwise, *shall be deemed to be a railroad company.*" Other quasi-public companies are similarly defined. Obviously a definition of that sort would include receivers, and it was such meaning of the word "company" that Congress had in mind when it used it in the statute in question.

"*Company*," in section 4388, means the common carrier, whether by rail or boat, who is obliged by section 4386 to give animals in transit over its line an opportunity for rest, food, and water. This company may be a person or persons, a partnership, association, or corporation, and it may act individually or through its officers or receivers; in either case it is a company within the meaning of this section, liable to the penalty if it has violated the act.

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Solicitor-General.

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